# Jurisdiction, Venue, & Transfer

Chapter 3

## Summary of Contents



## 3.1 Preference for Keeping Children With Their Parents If Conducive to Child's Welfare and State's Best Interests

The provisions of the Juvenile Code must be liberally construed so that each child coming within the jurisdiction of the Family Division receives the care, guidance, and control, preferably in his or her own home, conducive to the child's welfare and the best interest of the state. MCL 712A.1(3); MSA

27.3178(598.1)(3), and MCR 5.902(B). If a child is removed from the control of his or her parents, the child must be placed in care as nearly as possible equivalent to the care that should have been given to the child by his or her parents. *Id.* The court rules governing protective proceedings within the Family Division are to be construed to secure fairness, flexibility, and simplicity. MCR 5.902(A).

"Parent" means a person who is legally responsible for the control and care of the minor, including a mother, father, guardian, or a custodian (other than a custodian of a state facility, guardian ad litem, or court-ordered custodian). MCR 5.903(A)(12).

A natural parent cannot be deprived of the custody of his or her child by a nonparent absent a showing of parental unfitness (i.e., abuse or neglect). It is presumed, absent a showing of parental unfitness, that the "best interests of the child" are served by parental custody. See MCL 712A.1(3); MSA 27.3178(598.1)(3), *In re Ernst*, 373 Mich 337, 371 (1964) (child returned to natural father instead of placement with maternal grandparents), and *In re Weldon*, 397 Mich 225, 324–36 (1976) (opinion by Levin, J). Assumption of jurisdiction under the Juvenile Code over a child does not establish "parental unfitness" sufficient to allow a nonparent to petition for custody of the child under the Child Custody Act. *Searcy v Searcy*, 173 Mich App 188, 192 (1988).

## 3.2 Subject Matter Jurisdiction Over Child Protective Proceedings

Prior to January 1, 1998, the juvenile division of the probate court had "original jurisdiction in all cases of juvenile . . . dependents, except as otherwise provided by law." Const 1963, art 6, § 15, MCL 600.841; MSA 27A.841, and MCL 712A.2; MSA 27 3178(598.2). "Dependency" may be used to describe a child who falls within the Family Division's jurisdiction of child protective proceedings. A "dependent child" is "any child who for any reason is destitute or homeless or abandoned or dependent upon the public for support, or who has not proper parental care or guardianship...." *In the Matter of Curry*, 113 Mich App 821, 825 (1982), quoting 1909 PA 310, a predecessor to the current Juvenile Code. See also MCR 5.903(C)(2) (court has jurisdiction over abused, dependent, and neglected children).

Effective January 1, 1998, the newly created Family Division of the Circuit Court ("Family Division") was assigned subject matter jurisdiction over child protective proceedings. MCL 600.1001; MSA 27A.1001, and MCL 600.1021(1)(e); MSA 27A.1021(1)(e). Except as otherwise provided by law, the Family Division now has sole and exclusive jurisdiction over cases involving juveniles commenced on or after January 1, 1998. MCL 600.601(3); MSA 27A.601(3), and MCL 712A.2(b); MSA 27.3178(598.2)(b).

**Note 1:** MCL 600.1009; MSA 27A.1009, states that a reference to the former juvenile division of the probate court in any statute shall be construed as a reference to the family division of circuit court. See also MCR 5.903(A)(8) ("juvenile court" or "court" means Family Division of the Circuit Court when used in court rules).

In *In re Hatcher*, 443 Mich 426, 437 (1993), the Court found that subject matter jurisdiction of protective proceedings is established if "the action is of a class that the court is authorized to adjudicate, and the claim stated in the complaint is not clearly frivolous. The valid exercise of the probate court's statutory jurisdiction is established by the contents of the petition after the probate judge or referee has found probable cause to believe that the allegations contained within the petitions are true." Subsequent procedural errors do not render the proceedings void ab initio.*

*See Section 21.8 for a discussion of "collateral attack" of jurisdiction when a direct appeal is no longer available.

**Note 2:** The court's assumption of subject matter jurisdiction should be distinguished from the court's exercise of jurisdiction over the child, which may occur only after the finder of fact determines whether the child falls within one of the statutory bases for jurisdiction. *In re Brock*, 442 Mich 101, 108–09 (1993). See Section 3.4, below, for a list of these statutory bases.

## 3.3 Definition of "Child Protective Proceeding"

A "child protective proceeding" is a proceeding concerning an "offense against a child." MCR 5.903(A)(2). "Offense against a child" means an act or omission by a person other than the child asserted as grounds for bringing the child within the jurisdiction of the Family Division pursuant to the Juvenile Code. MCR 5.903(C)(5). However, child protective proceedings are not criminal proceedings. MCL 712A.1(2); MSA 27.3178(598.1)(2). See, generally, *People v Gates*, 434 Mich 146, 161–65 (1990) (because the purposes of criminal and child protective proceedings differ, application of collateral estoppel to bar a criminal proceeding after a jury has found that a child does not come within the court's jurisdiction in a child protective proceeding would be contrary to public policy).

## 3.4 Statutory Bases of Personal Jurisdiction*

*See Sections 3.7–3.14, below, for examples of cases interpreting these statutory bases of personal jurisdiction.

The "juvenile court" is a court of limited jurisdiction that derives its authority from constitution and statute; thus, there must be evidence presented that shows that the child falls within one of the statutory bases for the court's jurisdiction. *In re Nelson*, 190 Mich App 237, 239 (1991).

MCL 712A.2(b)(1)–(4); MSA 27.3178(598.2)(b)(1)–(4), of the Juvenile Code provides that the Family Division has personal jurisdiction over any child under 18 years of age found within the county:

- whose parent or other person legally responsible for the care and maintenance of the child, when able to do so,* neglects or refuses to provide proper or necessary support, education, medical, surgical, or other care necessary for his or her health or morals;

*See *In re Sterling*, 162 Mich App 328, 338–39 (1987), for an explanation of the importance of the phrase "when able to do so." It is apparent that this phrase refers to a parent's financial ability to provide support and care rather than the parent's physical ability to do so. Compare Section 3.7, below.

**Note 1:** "'Education' means learning based on an organized educational program that is appropriate, given the age, intelligence, ability, and any psychological limitations of a juvenile, in the subject areas of reading, spelling, mathematics, science, history, civics, writing, and English grammar." MCL 712A.2(b)(1)(A); MSA 27.3178(598.2)(b)(1)(A).

Home schooling may satisfy the requirements enumerated above for an educational program sufficient to avoid an allegation of "educational neglect." See MCL 380.1561(3)(f); MSA 15.41561(3)(f). Moreover, because it is often difficult to distinguish between "educational neglect" and "truancy," a preliminary inquiry may be held to determine whether to proceed under the child protective proceedings provisions or the delinquency proceedings provisions of the Juvenile Code. See MCL 712A.2(a)(4); MSA 27.3178(598.2)(a)(4) (jurisdiction over truants).

- who is subject to a substantial risk of harm to his or her mental well-being;
- who is abandoned by his or her parents, guardian, or other custodian;
- who is without proper custody or guardianship;

**Note 2:** "'Without proper custody or guardianship' does not mean a parent has placed the juvenile with another person who is legally responsible for the care and maintenance of the juvenile and who is able to and does provide the juvenile with proper care and maintenance." MCL 712A.2(b)(1)(B); MSA 27.3178(598.2)(b)(1)(B).

*See Section 3.5, below, for a definition of "nonparent adult."

- whose home or environment, by reason of neglect, cruelty, drunkenness, criminality, or depravity on the part of a parent, guardian, nonparent adult,* or other custodian, is an unfit place for the child to live;
- whose parent has substantially failed, without good cause, to comply with a limited guardianship placement plan described in MCL 700.424a; MSA 27.5424(1), regarding the child; or

*See Section 3.14, below, for a discussion of the court's authority to take jurisdiction over a child following the appointment of a guardian.

- whose parent has substantially failed, without good cause, to comply with a court-structured guardianship placement plan described in MCL 700.424b; MSA 27.5424(2), or MCL 700.424c; MSA 27.5424(3), regarding the child.*

In addition, MCL 712A.2(b)(5); MSA 27.3178(598.2)(b)(5), provides that the Family Division has personal jurisdiction over a child under 18 years of age if the child has a guardian* and the child's parent meets both of the following criteria:

- the parent, having the ability to support or assist in supporting the child, has failed or neglected, without good cause, to provide regular and substantial support for the child for two years or more before the filing of the petition or, if a support order has been entered, has failed to substantially comply with the order for two years or more before the filing of the petition; and
- the parent, having the ability to visit, contact, or communicate with the child, has regularly and substantially failed or neglected, without good cause, to do so for two years or more before the filing of the petition.

*For a detailed discussion of the use of guardianships as an alternative to child protective proceedings, see Benchnote 7.

In protective proceedings, jurisdiction cannot be conferred on the Family Division by consent of the parties. *In re Youmans,* 156 Mich App 679, 684 (1986). A determination that the Family Division has jurisdiction over the child pursuant to MCL 712A.2(b); MSA 27.3178(598.2)(b), is made following a plea or trial. See MCL 712A.18(1); MSA 27.3178(598.18)(1).

After it is determined that the children are within the court's jurisdiction under MCL 712A.2(b); MSA 27.3178(598.2)(b), the court has the authority to conduct a hearing to determine whether parental rights to the child should be terminated. See MCL 712A.19b; MSA 27.3178(598.19b), and *In the Matter of Taurus F,* 415 Mich 512, 526, 527 (1982).

The Court of Appeals has held that both the jurisdiction and the termination statutes are not unconstitutionally vague. *In re Gentry,* 142 Mich App 701, 707 (1985).

## 3.5 Definition of "Nonparent Adult"

A "nonparent adult"* is a person 18 years old or older who, regardless of the person's domicile, meets all of the following criteria in relation to a child over whom the court takes jurisdiction under MCL 712A.2(b); MSA 27.3178(598.2)(b):

- the person has substantial and regular contact with the child;
- the person has a close personal relationship with the child's parent or with a "person responsible for the child's health or welfare"; and
- the person is not the child's parent or a person otherwise related to the child by blood or affinity to the third degree.

MCL 712A.13a(1)(g)(i)–(iii); MSA 27.3178(598.13a)(1)(g)(i)–(iii).

*See also Sections 2.2(C) (investigation of abuse or neglect), 7.19 (ordering "nonparent adult" out of child's home), 13.21 (ordering "nonparent adult's" compliance with Case Service Plan), and 16.11 (notice requirements).

**Note:** The provisions allowing for jurisdiction over children based on the acts and omissions of "nonparent adults," and requiring the "nonparent adult's" compliance with the Case Service Plan are effective July 1, 1999. See 1998 PA 530.

## 3.6 Temporary Neglect Is Sufficient for Court to Take Jurisdiction

The Michigan Supreme Court has attempted to set forth the quantum of neglect necessary for a trial court to take temporary and permanent custody of a child:

> "[W]e hold that, while evidence of temporary neglect may suffice for entry of an order taking temporary custody, the entry of an order for permanent custody due to neglect must be based upon testimony of such a nature as to establish or seriously threaten neglect of the child for the long-run future."

*Fritts v Krugh*, 354 Mich 97, 114 (1958). In *Fritts*, the father left his wife and their two children following an argument. The mother testified that her husband left them a small amount of money, but that she had to borrow money temporarily for milk for the children. Two weeks later the mother initiated voluntary adoption proceedings. Before any hearing on the petition occurred, but after the children were placed in foster care, the parents reconciled and sought to reclaim their children. The trial court terminated parental rights, but the Michigan Supreme Court reversed, finding that the proofs did not support even the assumption of temporary jurisdiction over the children. *Id.*, at 101–09, 114–15.

## 3.7 Parental Culpability Is Not Required for Court to Take Jurisdiction of Child Because of an Unfit Home

In *In re Jacobs,* 433 Mich 24, 33–34 (1989), the Court distinguished between "neglect" as defined in MCL 712A.2(b)(1); MSA 27.3178(598.2)(b)(1), which, by its terms, requires parental culpability, and "neglect" as defined in MCL 712A.2(b)(2); MSA 27.3178(598.2)(b)(2), which does not require culpability. Under §2(b)(1), a parent or other person legally responsible for the care and maintenance of a child must be able to provide proper or necessary support or care and neglect or refuse to do so.* For example, in *In re Kurzawa,* 95 Mich App 346, 354–57 (1980), the Court of Appeals held that culpability is required for the trial court to take jurisdiction of a child for "emotional neglect." Under §2(b)(2), however, the child's home may be unfit without a finding that the parent is to blame for that unfitness. Culpable neglect is not required in cases involving allegations of an unfit home, since the purpose of the Juvenile Code is to protect children from such homes, "not to punish bad parents." *Jacobs, supra,* at 41, quoting *In re Sterling,* 162 Mich App 328, 339 (1987). In *Jacobs,* the mother of two children suffered a stroke that left her physically impaired and unable to establish a permanent home for the children, and jurisdiction was taken under §2(b)(2).

*But see MCL 712A.19b (3)(g); MSA 27.3178 (598.19b)(3) (g), which expressly excludes consideration of intent when deciding whether parental rights should be terminated for failure to provide proper care or custody for the child. See Section 18.33 for a discussion of this provision.

## 3.8 Anticipatory Neglect Is Sufficient for Court to Take Jurisdiction of a Newborn Child

Although the Family Division may not assert jurisdiction over an unborn child, the doctrine of "anticipatory neglect or abuse" may allow the court to assume jurisdiction of the case immediately after the birth of a child. In *In re Dittrick Infant,* 80 Mich App 219, 222–23 (1977), the mother's parental rights to her first child were terminated due to physical and sexual abuse. Just prior to the termination hearing, the mother became pregnant again, and the Department of Social Services (now the Family Independence Agency) petitioned the court to take jurisdiction before the baby was born. The Court of Appeals found that the probate court could not assume jurisdiction over an unborn person, as it is not a "child" for purposes of MCL 712A.2(b); MSA 27.3178(598.2)(b).*

*See also Section 11.8 (evidence of treatment of one child is probative of the alleged treatment of another child).

In *In the Matter of Baby X,* 97 Mich App 111, 116 (1980), the Court, citing *Dittrick, supra,* held that a newborn suffering from symptoms of narcotics withdrawal could be considered a neglected child within the subject matter jurisdiction of the probate court.*

*See also Section 2.8 for reporting requirements.

## 3.9 Case Law Defining Culpable Failure or Refusal to Provide Support or Care ("Neglect")

The following cases construe that portion of §2(b)(1) of the Juvenile Code that allows for assumption of jurisdiction when a parent or other person legally responsible for the care and maintenance of a child is able to provide proper or necessary support or care and neglects or refuses to do so.

- *In re Waite*, 188 Mich App 189, 195 (1991): where the child's parent placed the child in the temporary care of a friend who had two children of her own, and where the child was injured while in the friend's custody, the trial court erred in finding sufficient facts to support taking jurisdiction of the child.
- *In re Nash*, 165 Mich App 450, 456 (1987): where the parent appeared to be intoxicated during visits by social workers, threatened the children, failed to provide adequate food, where the children were previously made temporary wards for educational neglect, and where one child showed symptoms of drug withdrawal soon after birth, the trial court properly found that sufficient evidence was presented to support taking jurisdiction of the children.
- *In re Adrianson*, 105 Mich App 300, 311–15 (1981): where the parent failed to provide adequate medical care, the children had poor school attendance, and the parent was incarcerated for a short period, the trial court properly took jurisdiction; however, allegations that there was debris on the front porch and that the parent had a "personality conflict" with one child were insufficient by themselves to establish jurisdiction.
- *In re Franzel*, 24 Mich App 371, 373–75 (1970): where the mother showed a marked preference for her older child, which led to her failure to meet the physical and emotional needs of the younger child, the evidence was sufficient to find the younger child within the court's jurisdiction.

## 3.10 Case Law Defining "Substantial Risk of Harm" to Child's Mental Well-Being ("Emotional Neglect")

The following cases construe that part of §2(b)(1) of the Juvenile Code that allows the court to take jurisdiction over a child who is "subject to substantial risk of harm to his or her mental well-being."

- *In re SR*, 229 Mich App 310, 315 (1998): after the father attempted to kill the child and commit suicide, he was found guilty of second-degree child abuse and sentenced to prison. The Court of Appeals held that the lower court erred in refusing to assume jurisdiction on the basis of a substantial risk of harm to the child's mental well-being. The Court stated that the parent's incarceration does not eliminate the emotional impact on the child of the previous events.
- *In re Middleton*, 198 Mich App 197, 199–200 (1993): the mother was developmentally disabled and under plenary guardianship. Under the Mental Health Code, a plenary guardian may be appointed only where a court finds "by clear and convincing evidence that the respondent is developmentally disabled and is *totally without capacity to care for himself or herself* . . . ." The Court of Appeals held that, in such circumstances, the mother's status, by itself, gave rise to the presumption that her newborn daughter was both at "substantial risk of harm to . . . her mental well-being" and "without proper custody or guardianship."

- **F** *In re Arntz,* 125 Mich App 634, 637–38 (1983), rev'd on other grounds 418 Mich 941 (1984): in 1979, the respondent placed her two children with their paternal grandparents and had the grandparents appointed as legal guardians. In 1981, respondent dissolved the guardianship and attempted to have her children returned to her. The Department of Social Services (now the Family Independence Agency) then filed a child protective proceedings action against respondent, alleging emotional neglect.* The Court of Appeals found that the assumption of jurisdiction was proper because the mother's failure to visit during the guardianship temporarily deprived the children of emotional well-being. See also *In re Mathers,* 371 Mich 516, 527–29 (1963) (failure of parents to visit for one year or provide support sufficient to establish jurisdiction).

*At the time of this case, the Legislature had not yet enacted the statutory section that permits the court to take jurisdiction on the grounds that a parent has failed to substantially comply with a limited guardianship placement plan. See Section 3.14(B), below.

- **F** *In re Kurzawa,* 95 Mich App 346, 354–57 (1980): the petitioner alleged that respondents' five-year-old child was deprived of his emotional well-being by the parents' failure to control the child's violent and antisocial behavior. The Court of Appeals found that the allegation did not constitute neglect, as the court below based its assumption of jurisdiction on the behavioral problems and treatment needs of the child rather than the parents' culpability in failing to provide for the emotional well-being of the child.

## 3.11 Case Law Defining "Abandonment"

The following cases construe that portion of §2(b)(1) of the Juvenile Code that allows the court to take jurisdiction over a child who is abandoned by his or her parents.

- **F** *In re Nelson,* 190 Mich App 237, 240–41 (1991): the Court found that the mother's leaving the child with a grandparent without providing for the child's support was insufficient to allow assumption of jurisdiction. Instead, placing a child with a relative who will provide proper care evidences concern for the child's welfare.*

*But see Section 3.12, below, for a discussion of the requirements for leaving a child in the temporary custody of a relative.

- **F** *In re Youmans,* 156 Mich App 679, 685 (1986): a mother's statement that she had left home and would not return was insufficient to establish abandonment by both parents, as there was no evidence presented that the father would be unable to care for the children.

## 3.12 Case Law Defining "Without Proper Custody or Guardianship"*

*For a discussion of the rights of putative fathers to custody of a child, see Section 9.12.

The following cases construe that portion of §2(b)(1) of the Juvenile Code that allows the court to take jurisdiction over a child who is "without proper custody or guardianship."

Placement of the child by the parent with another person who is legally responsible for the care and maintenance of the child and who provides the child with proper care and maintenance does not establish that the child is "without proper custody or guardianship." MCL 712A.2(b)(1)(B); MSA 27.3178(598.2)(b)(1)(B). Such placement is often in the home of a relative.

See *In re Nelson,* 190 Mich App 237, 241 (1991), *In the Matter of Carlene Ward,* 104 Mich App 354, 358–60 (1981), and *In the Matter of Curry,* 113 Mich App 821, 823–26 (1982).

**Note:** In *In the Matter of Taurus F,* 415 Mich 512 (1982), the Michigan Supreme Court attempted to define "proper custody," but the case contains no majority opinion. The Court's decision in *Taurus F* was prior to the addition of the current statutory definition in MCL 712A.2(b)(1)(B); MSA 27.3178(598.2)(b)(1)(B). After *Taurus F,* the Michigan Legislature amended MCL 712A.2(b)(1); MSA 27.3178(598.2)(b)(1), to add sub-subsection (B), which states that "'[w]ithout proper custody or guardianship' does not mean a parent has placed the juvenile with another person who is legally responsible for the care and maintenance of the juvenile and who is able to and does provide the juvenile with proper care and maintenance." See also SJI2d 97.05, which states:

"'Without proper custody or guardianship' means that the [child is/children are] not in the care of:

a. a parent, or
b. a court-appointed guardian, or
c. a person with whom the [parent has/parents have] placed the [child/children] and who has agreed with the [parent/parents] to be responsible for the care and maintenance of the [child/children] and who is able to and does provide the [child/children] with proper care and maintenance."

**F** *In re Systma,* 197 Mich App 453 (1992): respondent-father had not kept in contact with his child for several years after respondent's divorce from the child's mother. The mother became very ill and was admitted into a hospital. Because the respondent was in prison at the time, the mother contacted the Department of Social Services (now the Family Independence Agency) and voluntarily placed her child in foster care. The DSS temporarily placed the child with relatives until the mother died two weeks later. The DSS then filed a petition in juvenile court, asking for jurisdiction on the ground that the child was "without proper custody or guardianship." The Court of Appeals affirmed the granting of jurisdiction, and held that although temporary placement with a relative is "proper custody," it is only so when the respondent-parent placed the child with the relative. Thus, the father could not argue that custody was proper. Also, the legal requirements for creating a guardianship had not been met in this case.

**F** *In re Webster,* 170 Mich App 100, 105–06 (1988): the Department of Social Services (now the Family Independence Agency) filed a neglect petition against respondent, an unwed mother, alleging that respondent's one-year-old child was "without proper custody or guardianship." On the same date that the petition was filed, respondent executed a power of attorney delegating her parental powers to the natural father of the child. The natural father had lived with the mother and their child since the child's birth, but had not acknowledged paternity. The Court of Appeals affirmed the Probate Court's assumption of jurisdiction, holding that the execution of the power of attorney did nothing to change the child's environment, and that the child was still "without proper custody or guardianship."

- *In re Pasco,* 150 Mich App 816, 822–23 (1986): where the mother abandoned her seriously ill infant in a hospital, three months later suggesting that the child's grandmother care for the infant during the day while the mother attended school, the court did not err in taking jurisdiction of the child.
- *In re Hurlbut,* 154 Mich App 417, 421–22 (1986): respondent-father, who was serving a life sentence in prison for first-degree murder, appealed the termination of his parental rights to a three-year-old child that he had never seen. Respondent argued that the Probate Court improperly assumed jurisdiction after the child's mother died because the mother had named a testamentary guardian in her will. Therefore, the respondent argued, the child was not "without proper custody or guardianship" at the time of the mother's death. The Court of Appeals disagreed, holding that no proper guardianship was established, as a testamentary guardianship under MCL 700.423; MSA 27.5423, requires both parents to be deceased or the surviving parent to be legally incapacitated. Nor did the named guardians petition for "full" guardianship prior to the mother's death under MCL 700.424; MSA 27.5424.
- *In re Ernst,* 130 Mich App 657, 662–64 (1983): where the parent failed to make specific arrangements regarding the child's care, or to maintain contact with or be accessible to the grandparent with whom the child was placed, the court did not err in taking jurisdiction over the child.

## 3.13 Case Law Defining "Unfit Home Environment"

The following cases construe §2(b)(2), which allows for assumption of jurisdiction if the child's home is unfit without a finding that the parent is to blame for that unfitness.

- *In re Jacobs,* 433 Mich 24, 33–34 (1989): where respondent-mother suffered a stroke that severely limited her ability to care for the children, and where the children's father was caring for and living with his mother, who was recovering from surgery, the trial court did not err in taking jurisdiction over the children.
- *In re Brimer,* 191 Mich App 401, 408 (1991): where the mother's boyfriend's physical and sexual abuse of the mother's child rendered the home unfit, the trial court did not err in taking jurisdiction over the mother's child.

- **F** *In re Miller*, 182 Mich App 70, 74, 82 (1990): where the children's mother returned to the home with the children from a domestic assault shelter after father had beaten the children, and where neither parent sought needed medical attention for one child, the trial court did not err in taking jurisdiction of the children.*
- **F** *In re Brown*, 171 Mich App 674, 677–78 (1988): where the evidence showed that one of respondent's children had been physically beaten, the trial court did not err in taking jurisdiction over all of respondent's children on grounds that their home was unfit.
- **F** *In re Youmans*, 156 Mich App 679, 685 (1986): where the evidence showed that the home was dirty, that the children suffered severe diaper rash, and that one child got into a container of valium, the trial court erred in taking jurisdiction of the children.
- **F** *In the Matter of Curry*, 113 Mich App 821, 827–30 (1982): where both parents were in prison, but where the children were in the custody of their grandparents, the parents' status as convicted criminals alone was insufficient to support taking jurisdiction.
- **F** *In re Brown*, 49 Mich App 358, 365 (1973): where the mother engaged in a lesbian relationship without evidence that the relationship rendered the children's home environment unfit, the allegations were insufficient to establish jurisdiction.

*See National Council of Juvenile and Family Court Judges, *Effective Intervention in Domestic Violence and Child Maltreatment Cases: Guidelines for Policy and Practice* (Reno: University of Nevada, Reno), forthcoming, and Lovik, *Domestic Violence Benchbook: A Guide to Civil & Criminal Proceedings* (MJI, 1998), Section 1.8.

**Note 1:** SJI2d 97.06 states, in part, that a home or environment "is an unfit place in which to live because of neglect if there is a danger to the physical or emotional health of the [child/children]."

**Note 2:** Except for cases of emergency removal, an Indian child shall not be removed from the home unless there is clear and convincing evidence, including testimony by qualified expert witnesses, that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. MCR 5.980(C)(1) and 25 USC 1912(e). See *In re Jacobs*, 433 Mich 24, 39–42 (1989), explained above, as an example of a case in which an Indian child was placed in foster care because the mother was unable to provide the child with a fit place to live. For a detailed discussion of the applicable procedures when an Indian child is involved in a protective proceeding, see Chapter 20.

## 3.14 Court's Authority to Take Jurisdiction Over a Child Following the Appointment of a Guardian

The Probate Court has jurisdiction of guardianship proceedings and may appoint a guardian for a child. The Probate Court has the authority to order a court-structured guardianship placement plan and to agree to a limited

guardianship placement plan. See MCL 700.401(1); MSA 27.5401(1), and MCL 700.3(7); MSA 27.5003(7). The Family Division has ancillary jurisdiction of guardianship proceedings as described below. See MCL 600.1021(2)(a); MSA 27A.1021(2)(a).

There are three different statutory bases for jurisdiction that may be asserted following the appointment of a guardian for a child.* They are:

*See Section 3.12, above, for a discussion of Family Division jurisdiction over children who are "without proper custody or guardianship." Note that a court-ordered guardianship is not required for a child to be in the "proper custody" of a person other than a parent.

- a parent has substantially failed, without good cause, to comply with a limited guardianship placement plan described in MCL 700.424a; MSA 27.5424(1), regarding the child. MCL 712A.2(b)(3); MSA 27.3178(598.2)(b)(3);
- a parent has substantially failed, without good cause, to comply with a court-structured guardianship plan described in MCL 700.424b or .424c; MSA 27.5424(2) or .5424(3), regarding the child. MCL 712A.2(b)(4); MSA 27.3178(598.2)(b)(4); or
- a parent has placed a child with a guardian and the parent meets both of the following criteria:
  - the parent, having the ability to support or assist in supporting the child, has failed or neglected, without good cause, to provide regular and substantial support for the child for two years or more before the filing of the petition or, if a support order has been entered, has failed to substantially comply with the order for two years or more before the filing of the petition; and
  - the parent, having the ability to visit, contact, or communicate with the child, has regularly and substantially failed or neglected, without good cause, to do so for two years or more before the filing of the petition.

MCL 712A.2(b)(5); MSA 27.3178(598.2)(b)(5).

The following discussion summarizes the requirements for each of these statutory bases of jurisdiction.*

*For a complete discussion of the use of guardianships as permanent placements, see Benchnote 7.

## A. Jurisdiction Following Parent's Failure to Comply With Limited Guardianship Placement Plan

A limited guardianship placement plan is a consensual arrangement that is agreed to by the custodial parent, the proposed limited guardian, and the judge of the Probate Court who is assigned to the case. MCL 700.424a(2) and (3); MSA 27.5424(1)(2) and (3).*

*See Form PC 50, limited guardianship placement plan.

A limited guardian has all the powers and duties of a "full" guardian, except that the limited guardian may not consent to the adoption or marriage of the child. MCL 700.424a(6); MSA 27.5424(1)(6). A limited guardianship differs from a full guardianship in that the limited guardianship is initiated by a custodial parent, and the limited guardianship may be terminated at any time by the custodial parent if he or she has "substantially complied" with

the limited guardianship placement plan. MCL 700.424c(3); MSA 27.5424(3)(3). However, if the parent substantially fails, without good cause, to comply with the limited guardianship placement plan, then the Family Division may assume jurisdiction over the child in a child protective proceeding. MCL 712A.2(b)(3); MSA 27.3178(598.2)(b)(3). The limited guardianship placement plan form must contain a notice that informs the parent that substantial failure to comply with the plan without good cause may result in termination of the parent's parental rights. MCL 700.424a(2); MSA 27.5424(1)(2).

The limited guardianship placement plan must include provisions concerning all of the following:

(a) the reason why the parent or parents are requesting the court to appoint a limited guardian for the minor;

(b) parenting time and contact with the minor by his or her parent or parents sufficient to maintain a parent and child relationship;

(c) the duration of the limited guardianship;

(d) financial support for the minor; and

(e) any other provisions that the parties agree to include in the plan.

MCL 700.424a(2)(a)–(e); MSA 27.5424(1)(2)(a)–(e). See also MCR 5.764(B).

## B. Jurisdiction Following Parent's Failure to Comply With Court-Structured Guardianship Placement Plan

*The term "full" guardian is not contained in the statute but is used here to distinguish it from a limited guardianship.

A petition for a "full" guardianship* may be filed by any person interested in the welfare of the child, or by the child if he or she is 14 years of age or older. MCL 700.424(1); MSA 27.5424(1). A "full" guardian may be appointed if the Probate Court finds that any of the following statutory criteria have been met:

(a) the parental rights of both parents or of the surviving parent have been terminated or suspended by prior court order, by judgment of divorce or separate maintenance, by death, by judicial determination of mental incompetency, by disappearance, or by confinement in a place of detention;

(b) the parent or parents have permitted the minor to reside with another person and have not provided the other person with legal authority for the care and maintenance of the minor, and the minor is not residing with his or her parent or parents when the petition is filed; or

(c) all of the following:

(i) the minor's biological parents have never been married to one another;

(ii) the minor's parent who has custody of the minor dies or is missing and the other parent has not been granted legal custody under court order; and

(iii) the person whom the petition asks to be appointed guardian is related to the minor within the fifth degree by marriage, blood, or adoption.

MCL 700.424(2)(a)–(c); MSA 27.5424(2)(a)–(c).

**Note 1:** MCL 700.424(2); MSA 27.5424(2), was amended by 1998 PA 494, effective March 1, 1999, by the addition of the final clause to subsection (b), which reads: ". . . and the minor is not residing with his or her parent or parents when the petition is filed." Thus, the Probate Court may now appoint a guardian in these cases even if the parent or parents have retrieved the child following the filing of the petition for guardianship.

If the Probate Court grants a petition for a "full" guardianship, then the Probate Court may review the guardianship at any time it considers necessary, and must review it annually if the child is under six years of age. MCL 700.424b(1); MSA 27.5424(2)(1). Upon completion of the review, the Probate Court may order the parties to follow a court-structured guardianship plan designed to resolve the conditions identified at the review hearing. MCL 700.424b(3)(b)(ii)(B); MSA 27.5424(2)(3)(b)(ii)(B). The contents of the court-structured guardianship plan shall include all of the same provisions required for a limited guardianship placement plan. See MCR 5.764(B). However, unlike the limited guardianship placement plan, the court-structured guardianship plan does not have to be agreed to by the parties. The Probate Court may impose any requirements that are necessary for the welfare of the child. *Id.*

MCL 712A.2(b)(4); MSA 27.3178(598.2)(b)(4), provides that the Family Division has jurisdiction over a child protective proceeding if the parent substantially fails, without good cause, to comply with a court-structured guardianship plan.

**Note 2:** Although it is not specifically required by statute, the court-structured plan should contain a notice to the parents that failure to comply with the plan may result in the termination of their parental rights.

## C. Jurisdiction Following Parent's Failure to Support or Communicate With a Child Who Has a Guardian

MCL 712A.2(b)(5); MSA 27.3178(598.2)(b)(5), provides that the Family Division may assume jurisdiction in a protective proceeding if the child has a guardian, and the child's parent:

- having the ability to support or assist in supporting the child, has failed or neglected, without good cause, to provide regular and substantial support for the child for two years or more before the filing of the petition or, if a support order has been entered, has failed to substantially comply with the order for two years or more before the filing of the petition, and
- having the ability to visit, contact, or communicate with the child, has regularly and substantially failed or neglected, without good cause, to do so for two years or more before the filing of the petition.

**Note 3:** This statutory provision overlaps with the two statutory provisions explained in Sections 3.14(A) and (B), above, because conduct that meets the requirements for jurisdiction under this statute will also meet the requirements for jurisdiction under those statutes as well. That is, if a parent fails to visit and support his or her child for two years, then the parent will have clearly violated the terms of the guardianship. Therefore, it is unlikely that §2(b)(5) of the Juvenile Code will be used very often as a grounds for taking jurisdiction of a child.

However, if jurisdiction is assumed under §2(b)(5) of the Juvenile Code, then the following cases may provide guidance. Although there is no case law construing §2(b)(5), several cases have dealt with MCL 710.51(6)(a)–(b); MSA 27.3178(555.51)(6)(a)–(b), the "step-parent adoption" provision of the Adoption Code, which contains very similar language to the provisions above.

The requisite time period for lack of support or contact is two years or more, measured back in time starting with the filing of the petition. In *In re Halbert,* 217 Mich App 607, 611–12 (1996), the Court held that the time period was not "tolled" during the non-custodial parent's incarceration. An incarcerated parent may retain the ability to comply with the support and contact requirements of MCL 710.51(6)(a)–(b); MSA 27.3178(555.51)(6)(a)–(b). See also *In re Caldwell,* 228 Mich App 116, 118–24 (1998), and *In re Hill,* 221 Mich App 683, 691–96 (1997).

In *In re Kaiser,* 222 Mich App 619 (1997), the non-custodial parent "substantially failed" to comply with a support order in a divorce judgment, where she failed to notify the Friend of the Court of her employment status for over three years. Moreover, she had the ability to support or assist in supporting the child but refused because she desired to retaliate against her ex-husband. *Id.,* at 621–23. However, she did not "substantially fail" to

communicate with her child, where the court in the divorce proceeding had suspended visitation in the wake of sexual abuse allegations, and she had made good-faith efforts to re-establish visitation privileges by attending court-ordered counseling. *Id.,* at 623–25.

Where a parent has substantially failed to comply with a support order and has not petitioned the court for modification of the order, the court considering a petition for termination under MCL 710.51(6)(a)–(b); MSA 27.3178(555.51)(6)(a)–(b), need not examine the parent's reasons for noncompliance. *In re Martyn,* 161 Mich App 474, 480 (1987).

Similarly, where there has been no request for visitation privileges, the court may find that the non-custodial parent had the ability but failed to visit, contact, or communicate with the child. See *In re Simon,* 171 Mich App 443, 448–49 (1988) (two visits and one phone call in two years constitutes substantial failure), and *In re Colon,* 144 Mich App 805, 814 (1985) (8–11 visits in two-and-a-half years constitutes substantial failure).

## 3.15 Waiver of Jurisdiction in Divorce Proceedings

The Family Division may obtain jurisdiction of a child protective proceeding where the court, in a divorce proceeding, has previously waived jurisdiction over the child:

- in a temporary order for custody or upon a motion by the prosecuting attorney;
- in a divorce judgment dissolving a marriage between the child's parents; or
- by an amended judgment relative to the custody of the child in a divorce.

MCL 712A.2(c); MSA 27.3178(598.2)(c). See also MCL 600.1023(a); MSA 27A.1023(a) (Family Division has jurisdiction of divorce and ancillary matters), MCL 552.15; MSA 25.95 (waiver of jurisdiction over children under the age of 17 to Family Division during pendency of divorce proceeding) and MCL 552.16; MSA 25.96 (waiver of jurisdiction over children under the age of 17 to Family Division in judgment or following judgment of divorce).

Nonetheless, if an order for jurisdiction has been entered in the divorce case, waiver of that jurisdiction is not necessary to allow the Family Division to fully exercise its jurisdiction of protective proceedings. *Krajewski v Krajewski,* 420 Mich 729, 732–34 (1984), and MCR 3.205(A).* If, however, the court with jurisdiction of the divorce proceeding does waive jurisdiction, it must hold a hearing and make a preliminary finding that the child is abused or neglected. *In the Matter of Robey,* 136 Mich App 566, 572–74 (1984). After waiver, the court with jurisdiction of the protective proceeding must comply with the petition requirements in the Juvenile Code. Waiver does not automatically confer jurisdiction in the protective proceeding but acts only to provide the court with information upon which the court may authorize the filing of a petition. *Id.,* at 578–79. See MCL

*See Section 3.16, below, for an explanation of notice requirements.

712A.11(1); MSA 27.3178(598.11)(1) (after a person gives information to the court concerning a child, the court may conduct a preliminary inquiry to determine an appropriate course of action).

Whenever practicable, two or more matters within the Family Division's jurisdiction pending in the same judicial circuit and involving members of the same family must be assigned to the judge who was assigned the first matter. MCL 600.1023(1); MSA 27A.1023(1).

## 3.16 Procedures for Handling Cases When Child Is Subject to Prior or Continuing Jurisdiction of Another Court in Michigan

If a petition is filed in the Family Division alleging that the court has jurisdiction over the child under MCL 712A.2(b); MSA 27.3178(598.2)(b), and the custody of the child is subject to the prior or continuing order of another court of record of this state, the manner of the required notice and the authority of the Family Division to proceed are governed by court rule. MCL 712A.2(b); MSA 27.3178(598.2)(b). See, generally, *In re Brown*, 171 Mich App 674, 676–77 (1988) (where custody of respondent's children was previously awarded to respondent in a divorce proceeding, the Probate Court did not err in taking jurisdiction over respondent's children, after giving the required notice to the Circuit Court, on grounds that their home was unfit).

MCR 5.927 provides that the manner of notice to the other court and the authority of the Family Division to proceed are governed by MCR 3.205. A waiver or transfer of jurisdiction is not required for the full and valid exercise of jurisdiction by the subsequent court. MCR 3.205(A). See *In re DeBaja*, 191 Mich App 281, 288–91 (1991). The plaintiff or other initiating party must mail written notice of proceedings to:

(a) the clerk or register of the prior court, and

(b) the appropriate official of the prior court.

MCR 3.205(B)(2)(a)–(b).

The "appropriate official" means the Friend of the Court, juvenile officer, or prosecuting attorney, depending on the type of proceeding. MCR 3.205(B)(1).

**Note:** Although MCR 3.205(B) states that the plaintiff or other initiating party must mail the required notice, as a practical matter, the deputy register often sends the notice. See Form MC 28, which requires the signature of the court clerk, register, or deputy register.

The notice must be mailed at least 21 days before the date set for hearing, except that if the fact of continuing jurisdiction is not then known, notice

must be given immediately when it becomes known. MCR 3.205(B)(3). The notice requirement is not jurisdictional and does not preclude the subsequent court from entering interim orders before the 21-day period ends if it is in the best interests of the minor. MCR 3.205(B)(4). See also *Krajewski v Krajewski*, 420 Mich 729, 734 (1984) (subsequent court may enter temporary or permanent orders).

Upon receipt of notice, the appropriate official of the prior court:

(a) must provide the subsequent court with copies of all relevant orders then in effect and copies of relevant records and reports, and

(b) may appear in person at proceedings in the subsequent court, as the welfare of the minor and the interests of justice require.

MCR 3.205(D)(1)(a)–(b).

Upon request of the prior court, the appropriate official of the subsequent court:

(a) must notify the appropriate official of the prior court of all proceedings in the subsequent court, and

(b) must send copies of all orders entered in the subsequent court to the attention of the clerk or register and the appropriate official of the prior court.

MCR 3.205(D)(2)(a)–(b).

If a circuit court awards custody of a minor to a guardian or limited guardian pursuant to MCL 722.26b; MSA 25.312(6b), the clerk of the circuit court must send a copy of the judgment or order to the Probate Court with prior or continuing jurisdiction of the guardianship proceeding. MCR 3.205(D)(3).

Each provision of a prior order remains in effect until the provision is superseded, changed, or terminated by a subsequent order. MCR 3.205(C)(1). A subsequent court must give due consideration to prior continuing orders of other courts, and a court may not enter orders contrary to or inconsistent with such orders, except as provided by law. MCR 3.205(C)(2). Upon receipt of an order from the subsequent court, the appropriate official of the prior court must take necessary steps to implement the order in the prior court. MCR 3.205(D)(4). See *In re Foster*, 226 Mich App 348, 353–57 (1997) (Family Division with jurisdiction of abuse-neglect case may issue orders contradicting those issued in divorce proceeding).

## 3.17 Procedures for Handling Cases When Child Is Subject to Jurisdiction of Court in Another State*

*See Lovik, *Domestic Violence Benchbook: A Guide to Civil & Criminal Proceedings* (MJI, 1998), Chapter 13, for a more detailed discussion of the UCCJA.

The Uniform Child Custody Jurisdiction Act, MCL 600.651 et seq.; MSA 27A.651 et seq., provides that a Michigan court has jurisdiction of custody proceedings when the child is physically present in the state and has been abandoned or temporary action is necessary in an emergency to protect the child from threatened or actual mistreatment or abuse, or if the child is otherwise neglected or dependent. MCL 600.653(1)(c); MSA 27A.653(1)(c).

Before hearing the petition in a custody proceeding, a Michigan court must examine the pleadings and the registry required under MCL 600.666; MSA 27A.666, to determine if a court of another state is exercising jurisdiction in a custody proceeding. MCL 600.656(2); MSA 27A.656(2). "Custody proceedings" include neglect and dependency proceedings. MCL 600.652(c); MSA 27A.652(c).

A Michigan court cannot exercise its jurisdiction of custody proceedings if, at the time the petition is filed, a court of another state is exercising jurisdiction of custody proceedings. MCL 600.656(1); MSA 27A.656(1). There are two exceptions to this rule, however. The Michigan court may exercise its jurisdiction if:

- the court of the other state stays the proceedings because Michigan is a more appropriate forum or for other reasons, or
- temporary action is necessary in an emergency to protect the child from threatened or actual mistreatment or abuse, or if the child is otherwise neglected or dependent.

*Id.* To determine the appropriate forum for a case, see MCL 600.657; MSA 27A.657.

The Michigan court must communicate with a court of another state to determine the appropriate forum for proceedings. MCL 600.656(3); MSA 27A.656(3).

## 3.18 Continuation of Family Division Jurisdiction After Child Becomes 18 Years of Age

If the Family Division has exercised personal jurisdiction over a child pursuant to MCL 712A.2(b); MSA 27.3178(598.2)(b), prior to the child's 18th birthday, jurisdiction may continue until the child reaches age 20, or the court may terminate jurisdiction before that time. MCL 712A.2a(1); MSA 27.3178(598.2a)(1).

The term "child" is used to refer to a person alleged or found to be within the jurisdiction of the Family Division because of abuse, dependency, or neglect, and the term "minor" may be used to describe a person over age 18

over whom the court has continuing jurisdiction. MCR 5.903(A)(10) and 5.903(C)(2).

## 3.19 Family Division Jurisdiction and Authority Over Adults

Under MCL 712A.6; MSA 27.3178(598.6), the Family Division has jurisdiction over adults and may make orders affecting adults as in the opinion of the court are necessary for the physical, mental, or moral well-being of a particular child or children under its jurisdiction. However, those orders must be incidental to the jurisdiction of the court over the child or children (i.e., the orders must be entered after the court has taken jurisdiction over the child following plea or trial). *Id.* The authority to fashion remedies under MCL 712A.6; MSA 27.3178(598.6), extends beyond MCL 712A.18; MSA 27.3178(598.18), which provides dispositional alternatives. *In re Macomber*, 436 Mich 386, 389–93, 398–400 (1990).

The Family Division's authority over adults is greater under two other provisions of the Juvenile Code. MCL 712A.13a(4)–(5); MSA 27.3178(598.13a)(4)–(5), gives the court authority to order a parent, "nonparent adult," or other person out of the child's home before trial if the petition contains allegations of abuse. In addition, MCL 712A.6b; MSA 27.3178(598.6b), gives the court the authority to enter orders affecting "nonparent adults." The court's authority under §6b does not affect its jurisdiction or authority under §6.*

*See Sections 8.3–8.4 (ordering alleged abuser out of home) and 7.23 (orders affecting "nonparent adults).

## 3.20 Family Division Jurisdiction of Contempt Proceedings

The Family Division has the power to punish for contempt of court* in accordance with MCL 600.1701 et seq.; MSA 27A.1701 et seq., any person who wilfully violates, neglects, or refuses to obey and perform any order or process the court has made or issued while enforcing the provisions of the Juvenile Code. MCL 712A.26; MSA 27.3178(598.26).

*See Forms JC 36 (where the right to enforce payments of any delinquent account or unpaid reimbursement order is reserved) and JC 40.

## 3.21 Change of Venue

Venue is proper in protective proceedings in the county where the child is found. MCL 712A.2(b); MSA 27.3178(598.2)(b). A child is "found within the county" where the offense against the child occurred or where the child is physically present. "Offense against a child" means an act or omission. MCR 5.903(C)(5).

On motion of a party, the court may order a change of venue:

(1) for the convenience of the parties and witnesses, provided that a judge of the other court agrees to hear the case, or

(2) when an impartial trial cannot be had where the case is pending.

MCR 5.926(D)(1)–(2).

All costs of the proceeding in another county must be borne by the court ordering the change of venue. MCR 5.926(D).

## 3.22 Transfer of Case to County of Residence

When a minor is brought before a court in a county other than the county in which the minor resides, the court may transfer the case to the minor's county of residence before trial. MCR 5.926(B).

## 3.23 Required Procedures Following Transfer or Change of Venue

The court that orders transfer or change of venue must send the original or certified copies of the pleadings and documents to the receiving court without charge. MCR 5.926(E).

If the Family Division of a county other than the child's county of residence orders a disposition in the case, that court is responsible for costs of the disposition unless:

(1) the court in the child's county of residence agrees to pay the costs of disposition, or

(2) the minor is made a state ward pursuant to the Youth Rehabilitation Services Act, MCL 803.301 et seq.; MSA 25.399(51) et seq., and the child's county of residence withholds consent to transfer of the case.

MCR 5.926(C)(1)–(2).